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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 292

EMMA ECKER,

Petitioner,

vs.

ATLANTIC REFINING COMPANY AND UNITED STATES OF AMERICA AND HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

KENNETH C. PROCTOR,
FRANCIS D. MURNAGHAN, JR.,
Counsel for Petitioner.

The Daily Record Co., Baltimore 3, Md.

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on May 14, 1955.

CITATIONS TO OPINIONS BELOW

The Opinion of the District Court appears at page 205 of Volume I of the Record, as printed for the use of the Court below and filed with this Petition, and is reported in 125 F. Supp. 605. The Opinion of the Circuit Court of Appeals, printed at page 13 of Volume II of the Record, is reported in 222 F. 2d 618.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 14, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED

Petitioner, a naturalized United States citizen, was living in Austria, the land of her birth, prior to the outbreak of World War II. An attempt to return to the United States in 1940 was frustrated by the severe ill health of her husband, also a naturalized United States citizen. The State Department repeatedly ruled that both had overcome the presumption of repatriation through residence abroad and thus remained United States citizens. Their United States real estate was seized and sold by the Alien Property Custodian. The questions presented are:

1. Whether United States citizens living abroad without an intention of residing permanently are enemies of the United States under Sec. 2(a) of the Trading With the Enemy Act, 50 U. S. C. App. Sec. 2(a), and thus subject to confiscation of their property without just compensation or due process.

2. Whether, in the case of property of a non-enemy wrongfully seized and sold by the Alien Property Custodian, the statutory restriction of the owner's remedy to the net proceeds of sale, however inadequate, violates the just compensation and due process clauses of the Constitution.

3. Whether, under Sec. 12 of the Trading With the Enemy Act, the Custodian alone could direct a private sale of seized property despite the direction that all sales shall

be "at public sale . . . unless the President . . . shall otherwise determine . . ."

4. Whether irregularities and discriminations by the Custodian in dealing with Petitioner's property amounted to denial to her of due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Also involved are Secs. 2, 5(b), 7(c), 9(a), 12 and 17 of the Trading With the Enemy Act, 50 U. S. C. App. Secs. 2, 5(b), 7(c), 9(a), 12 and 17. The pertinent portions of these sections are printed in Appendix A, infra, pages 15-20.

STATEMENT

On September 9, 1952, Petitioner filed suit against the Atlantic Refining Company in the United States District Court for the District of Maryland for a judgment declaring her to be the owner of certain real estate, improved by a filling station, located in Towson, Maryland. The jurisdiction of the District Court was invoked because:

1. There is diversity of citizenship, the plaintiff being a citizen of Maryland and the defendant a citizen of Pennsylvania, and

2. Questions arise under the Trading With the Enemy Act.

The government intervened as defendant pursuant to 28 U. S. C. Sec. 2403 and F. R. C. P. Rule 24.

In 1909, Petitioner, Emma Ecker, and her husband Leopold Ecker, forsook Austria and emigrated to the United States where, in Towson, Maryland, he established a shoe repair shop. They purchased real estate in Towson, Maryland, and, in 1921, became United States citizens. In 1922 they purchased real estate near Vienna, Austria, and between 1922 and 1932 made several visits to Austria. Thereafter they stayed in Austria until Leopold Ecker's death in 1948 and Emma Ecker's return to the United States in 1951. After 1932, return of the Eckers to the United States was frustrated by (a) ill health of Emma Ecker (gall bladder trouble and varicose veins), (b) ill health of Leopold Ecker (chronic high blood pressure, stroke in 1937, hemorrhage of the brain and paralysis), (c) old age, and (d) outbreak of World War II. In 1940 the Eckers obtained from the State Department authorization for a passport as American citizens to return to the United States. Because of Mr. Ecker's ill health and travel difficulties, the plan to return could not be carried out. Throughout their stay in Austria, the Eckers frequently expressed an intention to return to the United States which they regarded as their permanent home.

In September, 1943, the Alien Property Custodian, at the suggestion of the Eckers' tenant, the Atlantic Refining Company, seized the Eckers' real estate in Towson, Maryland. Atlantic suggested seizure to the Custodian because of its desire to purchase the property and of its inability to reach agreement with the Eckers. Simultaneously with seizure, the Custodian retained Schneider, the Ecker's attorney-in-fact, who had been handling the property for them, to manage it for the Custodian. In 1944 a public sale of the real estate was held yielding a high bid of $35,000. This sale was not consummated because of the pur-

chaser's doubt as to the title the Custodian could convey to property of a non-enemy wrongfully seized. The Custodian did not seek specific performance, or damages.

In his official reports to the President for the fiscal year 1945 and all subsequent years, the Custodian stated that he was withholding from sale, at the request of the State Department, all real estate vested from Austrian nationals. He further stated that he was not selling any real estate where the purchaser could not be protected by title insurance. Nevertheless, after negotiations instituted by Atlantic, the Eckers' tenant, a private sale was made in 1946 for $22,000. No other potential purchasers were approached by the Custodian. The Custodian required Atlantic to negotiate on the express condition that failure to obtain title insurance would not void the agreement. In fact, Atlantic's title policy exempted from coverage a claim by the Eckers on the grounds that they were not enemy aliens. The only finding that a public sale was not in the public interest was made by the Custodian himself.

In 1942 Atlantic had offered the Eckers $25,000 for the property. In 1943 it had appraised the property at $22,500., and its appraiser admitted that the price level for Towson real estate had generally increased by 1946 when the sale occurred.

The Eckers, behind enemy lines, could not bring proceedings under Sec. 9(a) of the Act for return of the property, which proceedings would have prevented sale. Their agent who might have done so on their behalf had been hired by the Custodian. Only in 1946 were postal communications between Austria and the United States resumed. Although the Eckers promptly made inquiries about their property and hired an attorney, he was not in time to pre-

vent a sale. That he could not do so was primarily due to the failure of the Custodian for over three months to answer his request for information concerning the property, although the request reached the official of the Custodian who negotiated the impending sale to Atlantic over two weeks prior to the consummation of the sale. A claim for return of the property filed on behalf of the Eckers resulted in payment to Petitioner of the proceeds of the sale to Atlantic. The Court below, in its Opinion, alludes to the possibility that acceptance of the proceeds by Petitioner may have barred a claim for the property itself. However, this contention has never been raised by the defendants, and was expressly disavowed by them at the argument below. Moreover, seizure of all the Ecker assets left them destitute, in no position to refuse the statutory offer of proceeds, even if inadequate. More importantly, to put Atlantic in the necessary status quo ante, a tender back of the sales price was made by Petitioner prior to suit, and is reiterated in the Complaint herein. By reason of the language of the Trading With the Enemy Act and the Government's sovereign immunity, Petitioner alone, and not Atlantic, could recover the wrongfully held proceeds from the Custodian.

The District Judge ruled that the administrative seizure by the Custodian was not subject to collateral attack and further that, if it was, the Eckers were residents of Austria within Sec. 2 of the Act and therefore enemies. He stated that their long stay in Austria was determinative, and that he gave little or no weight to their expressed intention and effort to return to the United States. He dismissed Petitioner's contentions under the Fifth Amendment because she had not "shown fraud, conspiracy or deceit or unfair dealing" by Atlantic either with Schneider, the Eckers' agent, or Custodian. He found Petitioner to have received

fair and just compensation for her property in the net proceeds of the purchase price of $22,000. He further concluded that the President's delegation to the Custodian of the power to order a private sale was valid.

The Court below affirmed the judgment of the District Court in favor of the defendants, basically relying on and reiterating the findings and conclusions of the District Judge.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below, on the issue of what constitutes residence that determines enemy status, is in direct conflict with the decision of the Seventh Circuit Court of Appeals in *Kaku Nagano v. McGrath*, 187 F. 2d 759, affirmed by equally divided Court, 342 U. S. 916 (Appendix B, infra, pp. 20-35), and with the decision of the Second Circuit Court of Appeals in *Josephberg v. Markham*, 152 F. 2d 644 (Appendix B, infra, pp. 35-43). In the first of those cases, involving a claimant who lived in Japan continuously from 1924 until 1950, it was held that she was not an enemy since residence in an enemy country means a "settled and permanent place of abode, volitionally acquired and voluntarily assumed", a "habitation having domiciliary properties". A similar conclusion in the *Josephberg* case was based in part on doubts as to the constitutionality of confiscating property of a United States citizen whose status in an enemy country was less than the substantial equivalent of domicile.

On the same day this Court affirmed the *Kaku Nagano* decision, it handed down its opinion in *Guessefeldt v. McGrath*, 342 U. S. 308. In that case constitutional doubts as to the right of confiscation of property of one who was not

even a United States citizen led to a conclusion that German citizenship alone did not justify confiscation. A full hearing on the question of whether he was resident in Germany was ordered. The statement in the Court's opinion that ". . . 'residence within' enemy territory implies something more than mere physical presence and something less than domicile . . ." was not indicative of this Court's opinion of where, between the two extremes of physical presence and domicile, the word "residence", as used in defining an enemy, lies. The statement appears in an opinion favorable to one claiming he was not a resident. The lower court cases, including *Josephberg v. Markham*, supra, to which the Court referred as providing "relevant extrinsic light" on the question of the meaning of "residence" all attach a domiciliary connotation to the term. The substantial equivalence of residence with domicile in the minds of a substantial segment of the Court is established by the affirmance of the *Kaku Nagano* case. Such was the conclusion of the Seventh Circuit in adhering to its earlier opinion, in *Kaku Nagano v. Brownell*, 212 F. 2d 262.

In both *Kaku Nagano* and *Josephberg* the claimants, who were found not to be residents within enemy countries, either lived abroad longer than the Eckers or engaged in at least as many activities as the Eckers indicating association with the foreign countries. Unlike the Eckers neither Josephberg nor Nagano made positive efforts to return to the United States before our entry into World War II. Nagano was not even a United States citizen. In the present case, the Court below did not even refer in its Opinion to these two decisions from other Circuits establishing a contrary principle. The District Judge sought to distinguish the cases, not upon the principles of law announced, but on the dubious grounds that one of them was decided on a mo-

tion to dismiss and that both involved situations where no sale of the property seized had occurred.

The decision below is in conflict with decisions of other circuits. Further, it presents again, on facts more favorable to the claimant, the issue on which this Court divided equally in the *Kaku Nagano* case. Thousands of claims for return of seized properties remain pending, and resolution of the vital issue of what constitutes enemy status through residence abroad will materially assist in disposition of many of them.

2. It is manifestly important both for persons who have already purchased, and for others who may be interested in purchasing, real estate seized by the Custodian to determine whether the Custodian can give good title where the property was wrongfully seized. The Act in §7(c) restricts recovery, where there has been a sale, to the proceeds of the sale, however inadequate, even though such proceeds do not amount to just compensation. *Pflueger v. U. S.*, 121 F. 2d 732 (C.A. D.C. 1941) cert. denied 314 U. S. 617. *Uebersee Finanz Korp. v. Markham*, 158 F. 2d 313 (C.A. D.C. 1946) affirmed 332 U. S. 480. *Duisberg v. U. S.*, 89 F. Supp. 1019 (Ct. Cl. 1950) cert. denied 340 U. S. 890. While this Court has determined that the remedy of return of the very property seized is constitutionally adequate, e.g., *Central Union Trust Co. v. Garvan*, 254 U. S. 554, it is a matter of first impression whether the proceeds of a sale, in which the price is set by the Government, without any judicial review, satisfies due process and just compensation requirements. The question was specifically referred to and left unanswered in *Becker Steel Co. v. Cummings*, 296 U. S. 74, 80. The attitude of the Court in *Becker*, however, was evident enough to lead this Court to cite it and *Henkels v. Sutherland*, 271 U. S. 298, as requiring "in suits by United

States citizens . . . repayment of just compensation when the Custodian has liquidated the vested assets". *Guessefeldt v. McGrath*, 342 U. S. 308, 318. "Such a construction, it is said, is necessary to preserve the act from constitutional doubt." Id. As to the adequacy, as just compensation, of a price determined solely by the Government, it was said in an alien property case considering the question by way of analogy:

> "A judicial determination that the price received for property sold under the bare statutory conditions amounts as a matter of law in all cases and under all circumstances to just compensation for the property sold would be a judicial stultification. It would devitalize the Fifth Amendment." *U. S. v. Chemical Foundation, Inc.*, 294 F. 300, 324 (D. Del. 1924), affirmed 5 F. 2d 191, 272 U. S. 1.

If we are right that the Act's remedy is constitutionally insufficient where non-enemy property has been seized and sold, it follows inevitably that the owner must be permitted to void the sale. Because of the Government's sovereign immunity, no other remedy is available. Consequently, the lower court manifestly erred in holding that any collateral attack on the correctness of the seizure was barred. This would be so only if the remedies under the Trading With the Enemy Act were adequate. The lower court has confused preliminary custodial seizures of *possession* only, which are not subject to collateral attack, with proceedings to test *title* to seized properties. In the latter, the owner is unembarrassed by the precedent administrative determination of enemy status. Cf. *Central Tr. Co. v. Garvan*, 254 U. S. 554, 569, with *Stoehr v. Wallace*, 255 U. S. 239, 246.

Therefore, this case squarely presents the important unanswered question whether the Government may summarily seize property of a non-enemy, and, thereafter, without any judicial condemnation, sell it, conveying good title, although the price is inadequate, and the owner is given no remedy beyond the inadequate proceeds of sale.

3. The Custodian's power of sale is given by Sec. 12 of the Act, which contains these provisos:

> "*Provided*, That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, *at public sale*, to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, *unless the President stating the reasons therefor, in the public interest shall otherwise determine: Provided further*, That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct." (Emphasis supplied.)

It is of importance to purchasers from the Custodian to determine whether, in the face of Sec. 12, the President can in fact do away entirely with the statutory prohibition of private sales solely on the Custodian's own say-so, by delegating to the Custodian power to supervise himself. Prior to the instant case, this question has never been judicially considered. The closest case is *U. S. v. Chemical Foundation, Inc.*, 272 U. S. 1. It was there held that the President might delegate his supervisory power *to someone altogether independent of the Custodian*. The case is no authority for the proposition that all supervision might be eliminated by delegating to the Custodian power to super-

vise himself. The Government's Brief in the *Chemical Foundation* case states at page 120:

> "If the President had undertaken in the face of this statute to authorize the Custodian to sell privately 'at such place and upon such terms and conditions' as he saw fit all of the manufacturing plants or all of the stocks and bonds which were seized under the Act, we do not believe anyone would attempt to sustain the validity of such an exercise of power under this Statute . . ."

The legislative history of the power of sale in Sec. 12 shows that the Custodian first requested an unrestricted power of sale. Congress, however, over objections from the sponsor of the bill, specifically provided for public sales as a protection to the Government and to the owner of property seized. The power to allow private sales was specifically given to the President, not to the Custodian, and was intended solely for exceptional cases where public sales would lead to return to enemy ownership. The debates make crystal clear the intent that, if waiver of the public sale requirement was to be made, someone other than the Custodian was to make it. It was not designed to permit a sale, as in this case, for $22,000., of a property for which a public auction had led to a bid of $35,000. Congress did not consider the possible administrative convenience of private sales as important as the safeguard provided by public sales against squandering of assets and skulduggery.

4. Particular irregularities in the Custodian's handling of the Eckers' property will be encouraged to develop into regular practices if the judgment of the lower court is permitted to stand. The improper actions of the Custodian regarding the Eckers' property create a need for exercise by this Court of its function as keeper of the Government's

conscience — as protector of the citizen from action inherently unjust, steeped in unconcern for the rights of individuals, and of the possible property rights of the United States itself. Here is the record:

(a) Without any investigation, without even an inquiry to the State Department as to the citizenship status of the Eckers, the Custodian seized their real estate solely because Atlantic informed the Custodian that it had failed in attempts to purchase the land from the Eckers, and would appreciate the Custodian's seizing the property in order to sell to Atlantic.

(b) Simultaneously with seizure, the Custodian hired as his own manager of the property Schneider, the Eckers' agent, the only person who could sue on behalf of the Eckers for return of the property, and thereby prevent a sale. The supposed right to bring such a suit is now advanced by the Government as an answer to our argument that limitation of recovery to proceeds of sale denies just compensation and due process.

(c) When a public sale yielded a high bid of $35,000, which approximated the then value of the property, the Custodian declined to sue the purchaser for specific performance, apparently because of unwillingness to test the constitutional validity of a sale of property wrongfully seized. Uncertainty over this issue, however, was depressing sales prices in general, and for this property in particular, because of title company refusal to insure real estate sold by the Custodian.

(d) A little more than two years later, at a time when land values had generally advanced, the Custodian negotiated privately with Atlantic a sale for only $22,000., with

the express requirement that the obtaining of title insurance not be a condition of the sale. Title insurance was denied Atlantic. No other possible purchasers were even approached by the Custodian.

(e) Both before and after the sale, the Custodian formally and unequivocally reported to the President that he had discontinued all sales:

(1) of real estate of Austrian nationals (at the request of the State Department)

(2) where the purchaser was denied title insurance.

(f) When, prior to completion of the sale to Atlantic, the Custodian's employee handling the sale received an inquiry on the Eckers' behalf, he sent an immediate noncommittal answer which made no mention of the impending sale. Only three months later, after the sale was completed, were the Eckers advised. By then, the possibility of filing a Sec. 9(a) suit, which would have prevented sale, was lost to Petitioner.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

August 1, 1955

APPENDIX A — TRADING WITH THE ENEMY ACT

§2. The word "enemy", as used herein, shall be deemed to mean, for the purposes of such trading and of this Act.

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

* * * * * *

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy".

* * * * * *

§5(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise —

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

* * * * * *

§7(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received

therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * * *

§9(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the

court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * * *

§12 * * * The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof, or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof; *Provided*, That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further*, That when sold at public sale, the alien

property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. * * *

* * * * * *

§17. The district courts of the United States are given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary".

APPENDIX B — CONFLICTING OPINIONS

Kaku Nagano v. McGrath

187 F. 2d 759

United States Court of Appeals
Seventh Circuit

Feb. 26, 1951

LINDLEY, Circuit Judge.

The District Court having allowed defendant's motion to dismiss plaintiff's complaint, plaintiff appeals. Consequently, our only question is whether, by the averments of the complaint, a good and sufficient cause of action was presented.

The averments are in substance as follows: Plaintiff, a native of Japan, is a permanent resident of the United States, and has resided within this country for a period in excess of seven consecutive years following 1915, when she first entered, and has never relinquished that residence.

She is married to Shinsaku Nagano, likewise a native of Japan, who immigrated to the United States as a permanent resident in the year 1906 and whose permanent residence, both legally and physically, has continued at all times in Chicago, Illinois. Plaintiff has been but temporarily in Japan, without intending at any time to abandon or relinquish her permanent residence in the United States. She is not an enemy or an ally of an enemy or a national of a designated enemy country within the meaning of the Trading with the Enemy Act, 50 U. S. C. A. Appendix §1 et seq.

The suit is brought against the Attorney General as successor to the Alien Property Custodian for the purpose of establishing plaintiff's ownership in certain shares of stock of The Fuji Trading Company, which have been taken over by the Custodian on the ground that plaintiff is a national of Japan, a designated enemy country.

The Fuji Trading Company is an Illinois corporation having its principal place of business in Chicago, and is engaged in the manufacture and sale of certain oriental food products. The enterprise was founded in 1910 by plaintiff's husband and has been carried on since that date under his sole management and direction. It is a leading company within the United States in terms of volume and reputation of product as compared with others engaged in the same line of business. The corporation was organized in 1912, and since that time, the husband has been its president and majority stockholder.

Prior to January 3, 1932, the total capital stock of the company consisted of 10,000 shares of common stock, ownership of which was as follows: Shinsaku Nagano, 6210 shares, plaintiff, 3780 shares, and the brother of plaintiff, one Miya, 10 shares. On January 3, 1932, the corporation declared a stock dividend of 5000 shares payable to the holders of record in proportion to their then holdings. Notwithstanding the direction of the resolution that the stock be delivered proportionately to the then existing stockholders, a single certificate for 5000 shares was issued in

the name of the wife. However, this certificate was retained in the possession of the husband and never actually or constructively delivered to plaintiff, who had, until approximately the time she instituted this suit, no knowledge of the stock dividend or of the issuance of the certificate in her name; such knowledge as she has in this respect has come to her solely through information given her by her attorney.

The averments as to plaintiff's residence in and absence from the United States are as follows: In January, 1914, plaintiff, then residing in Tokyo, married Shinsaku Nagano, then a permanent resident of the United States. Following the birth of a daughter, Masako, in Japan in November, 1914, plaintiff immigrated to the United States in January, 1915, as a permanent resident, leaving her daughter in the care of plaintiff's mother. In 1916, a son Shigeo, was born to plaintiff and her husband in Chicago. In 1919, plaintiff, her son, and her husband went to Japan on a voyage, having for its purpose the husband's recuperation from a severe attack of influenza which he had sustained during an epidemic occurring that year. While they were in Japan, another daughter, Takako, was born. After completion of their visit, the father, mother and son returned to Chicago, leaving the two daughters in the care of their grandmother. Plaintiff then continued to reside in Chicago with her husband until 1924.

In 1924, the daughter Takako's illness necessitated a visit to Japan by plaintiff and her husband. On this occasion they decided that plaintiff should remain in Japan as long as necessary to provide a Japanese education for the two daughters and for the American-born son, the latter's oriental education being deemed necessary in order to prepare him to take his place in his father's importing business. The daughters remained in Japan largely because of lack of marriage prospects except among their own race; they finished their education and reached marriageable ages in 1932 and in 1937. In Japan such marriages are arranged for by the parents and a friend acting as intermediary, who is called a matchmaker. The presence of the parent with the

daughter is indispensable. Contrary to the hopes of the father and mother, the anticipated marriages could not be arranged because so many of the young men were away in the army. This was at a time when Japan was engaged in military activities in Manchukuo. Finally, in 1941, Takako's marriage was arranged, but Masako is still unmarried and is past the age ordinarily acceptable for marriage. The United States Immigration Act of 1924, 8 U. S. C. A. §145 et seq., removed any right to bring the daughters to the United States during the years in which plaintiff was obliged to remain in Japan.

During all this period the husband remained physically present in and a permanent resident of the United States at Chicago. Plaintiff has at all times considered her home to be with her husband in Chicago, and has consistently retained her constant intention to return to her husband and her American residence at the earliest date possible. In the meantime, plaintiff's husband has visited her in Japan every year since her departure from the United States in the year 1924, save only for the years 1932 and 1933, during which she was in the United States, and save also for the war years, commencing in 1942. Plaintiff has at all times remained loyal to the United States and has not engaged in trade with Japan or participated in the Japanese war effort with Japan. During the war she was inactive and lived with her unmarried daughter in their cottage in Shizuoka. Her absence, because of these circumstances, she avers was only temporary and involuntary, occasioned by family obligations and not for the purpose of trading with Japan or for the purpose of residing in Japan.

In addition to the averments mentioned, the record contains an order of the Immigration and Naturalization Service of the Department of Justice, August 11, 1950, in which the Assistant Commissioner, Adjudications Division, held that there was ample evidence of record to support the conclusion reached by the Board of Special Inquiry and the American Consular Service that plaintiff was then returning to America from a temporary visit abroad; that she had

never voluntarily relinquished her domicile in the United States and that she was entitled to enter this country "as a returning resident."

The District Court held as a matter of law that the facts averred were sufficient to bring her within the definition of an enemy contained in Section 2 of the Trading with the Enemy Act; that her long stay in Japan was such as to make of her a "resident within" the territory of an enemy nation, regardless of the possibility that her domicile remained at all times in the United States where her husband had his domicile. The court was of the opinion that the alleged family necessity relied on by plaintiff as justification for her long stay in Japan, was not sufficient to exempt her from the correct connotation of the word "enemy". Accordingly, it decided that a valid cause of action was not stated.

The court considered also Section 12 of the War Claims Act of 1948 (Public Law 896, 80th Congress, 2nd Sess.) which amended the Trading with the Enemy Act by adding thereto Section 39, which, defendant claims, prevents recovery by plaintiff because she is a national of Japan. However, it did not consider this section relevant to a case brought under Section 9(a) of the Act and held that the suit must fall, under the provisions of Section 9(a), because she was an enemy, but not because of the provisions of the new Section 39.

Upon appeal, plaintiff urges that the court erred in finding that, under the averments of the complaint, plaintiff is an enemy within the meaning of the Trading with the Enemy Act so that she may not maintain an action under Section 9(a) of the Trading with the Enemy Act to recover her property vested by the Alien Property Custodian.

The Government contends that the court rightfully held that plaintiff was barred from bringing her action and renews its contention that, under Section 39, plaintiff is absolutely barred from maintaining any action as a citizen of Japan.

Section 2 of the Trading with the Enemy Act of 1917, as amended, U. S. C. A. Title 50 Appendix, defines "enemy" as: "Any individual * * * of any nationality, resident within the territory * * * of any nation with which the United States is at war * * *." Section 7(c) provides for the seizure of enemy property belonging to or held for the benefit of an enemy, by the Alien Property Custodian; Section 9(a) that "Any person not an enemy * * * claiming any interest, * * * in any money or other property which may have been * * * seized by" the Custodian "* * * may file * * * a notice of his claim" and, if this is denied, "institute a suit * * * in the district court * * * to establish the interest, * * * so claimed", and if the claim is substantiated "the court shall order the * * * delivery to said claimant of * * * property so held." In pursuance of these pertinent statutes, plaintiff based her suit on her averments that she was a permanent resident of Chicago and, therefore, though an alien, not an enemy within the definition contained in Section 2; that she had never, since her marriage to an American resident, resided within Japan within the meaning of the Act and that, therefore, under Section 9(a) she was entitled to recover her assets taken over by the Custodian.

Whether the District Court rightfully held that she was an alien enemy within the meaning of the Act and, therefore, unable to maintain her suit, must be determined, of course, from the averments of her complaint, admitted by the defendant by his motion to dismiss. Essentially these are that, following her marriage, plaintiff entered the United States by permission of the government as a permanent resident and remained there as such until 1924; that after her visits to Japan in the intervening years, in each instance, she returned and was again admitted as a resident of the United States; that, upon the occasion of her last visit to Japan, she and her husband decided that she should remain in that country for the purpose of educating their daughters and getting them married and educating their son, preparatory to his participation in his

father's business of importation of oriental food products; that, under Japan's traditional customs and laws, the marriage of the daughters was a matter of contract, involving the intervention of a "matchmaker" and requiring the present of a parent; that, in pursuance of her stay, one daughter was married and that she was still living with the other in a cottage when the war with Japan intervened; that, after 1924, it was impossible, under the laws of the United States to obtain entry of the two girls to America; that it was practically impossible to find husbands for them except amongst members of their own race; that her stay in Japan was necessitated and imposed upon her by her family obligations and her parental duties; that at all times she intended to return to her home in Chicago to live there permanently with her husband; that she never abandoned her residence there and had no intention of abandoning the same or of changing it to any other place. Obviously, after the war intervened, it was impossible for her to leave Japan in fulfilment of this intention, and during that period, at least, she was under compulsory constraint in the legal sense of the word. After the war she did return to Chicago as a resident of the United States, being permitted to do so by the Immigration Bureau.

Residence being mostly a matter of intention, from the facts averred, it is clear that plaintiff never intended to change her established Chicago residence. The fact that she went to Japan in an attempt to discharge her parental duties does not negate the fact that her permanent residence was in Chicago and that her stay in Japan was for a limited period of time entailed by her praiseworthy sense of family obligation. Permanent residence does not arise out of a transitory abode or out of a temporary sojourn in a place other than that of residence. We think the averments of fact here such that it can only be said that on the face of the complaint she was at all times a permanent resident of the City of Chicago; that she never abandoned that residence and that, as such a resident of the United States, though an alien and at that time incapable of becoming

naturalized, she was never within the definition of an enemy, — a "resident within" enemy territory. In McGrath v. Zander, 85 U. S. App. D. C. 334, 177 F. 2d 649, 652, the Court of Appeals for the District of Columbia considered a similar situation with this conclusion: "The crucial term 'resident within' has been interpreted in Josephberg v. Markham, 2 Cir., 1945, 152 F. 2d 644, 648-649; Vowinckel v. First Federal Trust Co., supra [9 Cir.], 10 F. 2d [19] at pages 20, 21; Stadtmuller v. Miller, supra [2 Cir.], 11 F. 2d [732] at pages 737-739, 45 A. L. R. 895, and Sarthou v. Clark, D. C. S. D. Cal. 1948, 78 F. Supp. 139, 142. This last case epitomizes the several rulings in these words: '* * * "resident within the territory" as employed in the Act connotes something different from and more than living within the specified areas. It is rather indicative of a settled and permanent place of abode, volitionally acquired and voluntarily assumed. It is a habitation having domiciliary properties'." We agree with what was said by that court and with the other decisions cited and conclude that there is nothing in the averments of fact justifying a conclusion of fact that plaintiff was "resident within" Japan.

However, this conclusion is not entirely decisive of the questioned correctness of the judgment of the District Court. Upon the outbreak of the war in 1941, Congress by the First War Powers Act, immediately granted power to the President to vest the property of alien "nationals". However, it did not repeal Sections 2 and 9(a). As a consequence, the vesting power of the President was extended to the property of nationals but the right to sue for return, Section 9(a), still ran to nonenemies. This situation was considered by the Supreme Court in Clark v. Uebersee Finanz-Korporation, A. G., 332 U. S. 480, 68 S. Ct. 174, 176, 92 L. Ed. 88. After commenting that Section 5(b) of the Act of 1941 granted the President the power to vest any property of any foreign country or national thereof, the court continued: "While the scope of the President's power was broadened, there was no amendment restricting the scope of §9(a). As we have noted, §9(a) granted 'any per-

son not an enemy or ally of enemy', claiming an interest in property seized, the right to reclaim it. So the provision reads today. * * * The 1941 amendment to §5(b) reflected a complete reversal in that policy. The power of seizure and vesting was extended to all property of any foreign country or national so that no innocent appearing device could become a Trojan horse. Congress did not, however, alter the definitions of enemy or ally of enemy contained in §2. They remain the same as they were at the time Behn, Meyer & Co. v. Miller [266 U. S. 457, 45 S. Ct. 165, 69 L. Ed. 374] was decided. * * * Though neither §2 nor §9(a) was amended with §5(b) in 1941, one of them must be read differently after than before that event. * * * We believe a more harmonious reading of §2, §5(b) and §9(a) is had if the concept of enemy or ally of enemy is given a scope which helps the amendment of 1941 fulfill its mission and which does not make §9(a) for the first time in its history and contrary to the normal connotation of its terms stand as a barrier to the recovery of property by foreign interests which have no possible connection with the enemy." In short, Section 5(b) as amended 1941, extended the power of seizure but it did not purport to limit the right of non-enemies to recover under Section 9(a).

Up to this point we find nothing to impede plaintiff's action, but on July 3, 1948 Congress enacted an amendment which added Section 39, which provides that no property of "any national" of Japan vested in or transferred to an officer or agent of the government pursuant to the provisions of the Act shall be returned to the former owners and that the United States shall not pay compensation for such property or interest therein. The word "national" had been defined in Executive Order No.8389, April 10, 1940, 5 F. R. 1400, as amended, 12 U. S. C. A. §95a note, as follows: "Any person who has been domiciled in, or a subject citizen or resident of a foreign country at any time on or since the effective date of this Order." This definition was reaffirmed in Executive Order No. 9193, July 6, 1942, 7 F. R. 5205, 50 U. S. C. A. Appendix §6 note. The First War

Powers Act, 1941, Title III, c. 593, 55 Stat. 838, 840, Section 302, 50 U. S. C. A. Appendix, §617, provided that all orders promulgated by the President heretofore under the Trading with the Enemy Act, as amended, which would have been authorized if the provisions of the Act and the amendments made by it had been in effect, are "hereby approved, ratified, and confirmed." Therefore, by act of Congress, the word "national" as defined in the Executive orders approved by Congress, includes any person who is a citizen of a foreign country. Thus, if Section 39 is to be taken at its literal face value, it is the law that a citizen of Japan is a national of that nation and that as such plaintiff may not recover her property even though Section 9(a) giving her right of action has not been expressly repealed. Such, says the government, is the situation here.

The District Court was of the opinion that Section 39 was not intended to repeal Section 9(a). It concluded that the amendment which added Section 39 and certain other sections was dealing with an entirely different purpose, namely, that of creating a special fund of properties seized by the Custodian to be maintained by the government in a special account and to be expended by it in accord with certain expressed purposes and that it was not the intention of Congress in the enactment of the amendment to deprive nonenemy residents of the United States of their existing right to recover property owned by them and mistakenly seized by the Custodian.

We are not at all concerned with those parts of the legislation of Congress which empower the President through his designated agents, to take certain property. It is beyond question that in time of war the Executive should be and has been authorized to seize property whenever it is suspected that it may be enemy property, but Congress, through recognizing the necessity of the broadest power in this respect in the Executive, has at all times evinced an intent not to keep from loyal residents, whether alien or citizen, nonenemy property which is rightfully in America, has served no enemy purpose and has threatened

to serve none. Such was the administrative policy expressed by the Custodian in his presentation to the Congressional Committee, where he said that on occasion he had found it necessary to vest property which he later discovered he was not entitled to keep. He proceeded thus, he reported, because he considered it necessary to resolve all questions of jeopardy against the United States in favor of the government; if he had a strong suspicion that certain property was enemy property it was his conscientious duty to vest it. He added that subsequent investigations might indicate that he had been mistaken and, in such case, the property should be returned. The Supreme Court approved this practical solution of the problems involved in Becker Steel Co. v. Cummings, 296 U. S. 74 at page 79, 56 S. Ct. 15, at page 18, 80 L. Ed. 54, where it said: "Section 7 of the Trading with the Enemy Act conferred on the Alien Property Custodian authority summarily to seize property upon his determination that it was enemy owned, and such a seizure was lawful even though the determination were erroneous. Central Union Trust Co. v. Garvan, 254 U. S. 554, 41 S. Ct. 214, 65 L. Ed. 403; Stoehr v. Wallace, 255 U. S. 239, 41 S. Ct. 293, 65 L. Ed. 604; Commercial Trust Co. of New Jersey v. Miller, 262 U. S. 51, 43 S. Ct. 486, 67 L. Ed. 858. But in thus authorizing the seizure of property as a war measure Congress did not attempt the confiscation of the property of citizens or alien friends." This same thought is expressed in Central Trust Co. v. Garvan, 254 U. S. 554, 566, 41 S. Ct. 214, 215, 65 L. Ed. 403, as follows: "There can be no doubt that Congress has power to provide for an immediate seizure in war times of property supposed to belong to the enemy, * * * if adequate provision is made for a return in case of mistake." As said in Lamar v. Browne, 92 U. S. 187, 196, 23 L. Ed. 650, necessarily, the custodian must act upon appearances. It is his official duty to seize and hold, leaving to the owners to make good their claim as against the capture, in the appropriate tribunal established for that purpose. Thus we have developed a clearly defined policy governing the vesting of enemy property and return of innocent property to a nonenemy owner.

Plaintiff is, under the averments of her complaint, the owner of innocent American property, a friendly alien permanent resident of the United States and as such entitled to constitutional guarantees. Thus, in Silesian-American Corp. v. Clark, 332 U. S. 469, 68 S. Ct. 179, 184, 92 L. Ed. 81, the court said: "The constitution guarantees to friendly aliens the right to just compensation for the requisitioning of their property by the United States. Russian Volunteer Fleet v. United States (282 U. S. 481, 489-51 S. Ct. 229, 75 L. Ed. 473). We must assume that the United States will meet its obligations under the Constitution. Consequently, friendly aliens will be compensated for any property taken * * *." This, of course, refers to the guarantees of the Fifth Amendment, Russian Volunteer Fleet v. United States, 282 U. S. 481, 489, 51 S. Ct. 229. We think that the word "friendly" is as applicable to a loyal resident alien, even though of enemy nationality, as it is to one of our own citizens, and this seems to be the conclusion in other cases, such as Stadtmuller v. Miller, 2 Cir., 1926, 11 F. 2d 732; Vowinckel v. First Federal Trust Co., 9 Cir., 10 F. 2d 19, and Ex parte Kumezo Kawato, 317 U. S. 69, 63 S. Ct. 115, 87 L. Ed. 58. The Supreme Court, itself, said, in Becker Steel Co. v. Cummings, 296 U. S. 74, 79, 56 S. Ct. 18: "The seizure and detention which the statute commands and the denial of any remedy except that afforded by section 9(a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the nonenemy owner either the return of his property or compensation for it." Thus if Section 39 should be interpreted as the Custodian insists it should be, serious doubt would arise as to its constitutionality, for such a construction would effectuate confiscation of the innocent private property of a friendly resident alien without compensation. Furthermore, the United States has consistently bound itself by treaty to accord to alien residents within its jurisdiction the right of access to American courts to that degree of protection for their person and property required by international law and just compensation and due process of law, if their property should be taken. See 11 Stat. 587, 44 Stat. 2132, 2397, 4441, 45 Stat. 2641, 47

Stat. 2135, 48 Stat. 1507, 49 Stat. 2659, including treaties with various foreign nations.

We need no citation of authority to support the proposition that repeals by implication are never favored and that the clearest case possible must be made before an inference may properly be drawn that a later act by implication repeals an earlier one. By Section 39 and its related sections, Congress was creating a special fund for a special purpose and providing for the disposition of property that it had previously granted the Custodian the right to seize. It was not attempting to pass upon or to deny the rights of a friendly enemy owner or of an alien resident owner to assert his claim but had in mind undoubtedly, from the context of the entire act, the creation of a special account of enemy property seized. As Mr. Justice Douglas said in Clark v. Uebersee Finanz-Korporation, supra, Section 9(a) should be read harmoniously with subsequent legislation. In Uebersee Finanz-Korporation v. Markham, 81 U. S. App. D. C. 284, 158 F. 2d 313, 315, affirmed 332 U. S. 480, 68 S. Ct. 174, 92 L. Ed. 88, the Court of Appeals after concluding that any action provided by the Tucker Act, 28 U. S. C. 250, was forbidden by Section 7(c), 50 U. S. C. A. Appendix, held that to read out of the statutes the remedy created by Section 9(a) was not justified. "In any event", said the court, "to sustain the Custodian's position not only would require a major job of statutory reconstruction, but would also — as to the property of friendly aliens — raise grave doubts as to the constitutionality of the law. And this, of course, it is not permissible to do." Consequently it followed the language of the Supreme Court in Markham v. Cabell, 326 U. S. 404, 66 S. Ct. 193, 196, 90 L. Ed. 165, to the effect that by amending Section 5(a), Congress did not intend to delete Section 9(a), saying: "the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole."

In this connection it is well to bear in mind that in at least two instances, Congress refused to enact legislation

expressly amending or repealing Section 9(a). 14 H. R. 4840, 78th Cong., 2nd Sess. (1944) and H. R. 5089, 79th Cong., 2nd Sess. (1946). H. R. 4840 provided for a suit under Section 9(a) to establish that the claimant was not a foreign country or national thereof as defined in Section 5(b). If the claimant failed to prove these facts he would have been entitled to sue in the Court of Claims. The bill died in committee. Hearings Before Subcommittee No. 1 of the Committee on the Judiciary on H. R. 4840, 78th Cong., 2nd Sess. (1944). In H. R. 5089, it was proposed by Section 33(a) that "a foreign country or national thereof may not institute, prosecute, or further maintain a suit pursuant to Section 9(a) hereof in respect to any property or interest vested in or transferred to the Alien Property Custodian * * * or the net proceeds thereof", and by Section 33(b) that "notwithstanding the provisions of Section 7(c), such persons shall have the right to bring suit in the Court of Claims." But the House Judiciary Committee did not approve the bill. However, it was reintroduced as H. R. 6890, including again Sec. 33, and passed by the House with amendments with which we are not now concerned. However, the Senate Judiciary Committee deleted it. S. 2378, 79th Cong., 2nd Sess. (1946). The Senate Report explained the omission as designed to eliminate the proposal to cut off the right of a friendly foreign national to sue for and obtain return of his property under Section 9(a), thus retaining in full the "rights under Section 9(a) which friendly foreign nationals together with United States citizens, have had for more than twenty-five years under the Act." Sen. Rep. No. 1839, 79th Cong., 2nd Sess. (1946). The bill as amended was passed by both Houses with some members protesting the deletion of Section 33, 92 Cong. Rec. 10628 (1946). See letter of Secretary Byrnes to Chairman Summers of the House Judiciary Committee in connection with the hearings on H. R. 5089. Hearings Before Subcommittee No. 1 of the Committee on the Judiciary on H. R. 5089, 79th Cong., 2nd Sess. (1946) and Hearings Before Subcommittee No. 1 on the Judiciary on S. 2378, 79th Cong., 2nd Sess. (1946). Surely, after two determinations not to modify or

repeal Section 9(a) by express words, the Congress did not intend to do by implication what it had refused to do by express repeal. In this connection, it is pertinent also to observe that Section 33 was amended July 1, 1948, to fix time limits within which claims under Sections 9 and 32 might be prosecuted. Section 39 was amended July 3, 1948, with the result, as the government insists, of repealing Section 9. It seems inconceivable that Congress would, on July 1, expressly provide an extension of time within which to file suits under Section 9 and two days later, forbid such suits entirely.

We think the Congressional intent was, as stated by Judge Campbell in the District Court, to cause all forfeitable enemy property to be placed in a special fund for a special purpose and to keep it there irrecoverably for that special purpose. We think the legislation such and the Congressional history such that it is evident that Congress was not proposing to deprive friendly alien residents of all opportunity to recover untainted American property, — a right recognized for some twenty-five years by express legislation. To impute such an intent to the Congress would result in a conclusion that it intended to deprive resident owners of innocent private property, untainted by enmity, without due process of law.

Our conclusion might well rest upon another basis. Thus, though literally speaking, plaintiff is a citizen of Japan, she is not a citizen within the meaning of the word and its connotation recognized by judicial decisions. We ordinarily think of a citizen as one who owes allegiance to a state and has a reciprocal right to protection by it. It is obvious that plaintiff, a loyal American resident, unable to secure citizenship in this country, on the averments of her complaint, owed no allegiance to Japan and had no reciprocal rights to protection by it. Again, our concept of a citizen is one who has the right to exercise all the political and civil privileges extended by his government, yet, under the averments of this complaint, plaintiff had no right to exercise any of the political or civil privileges of Japan.

Citizenship conveys the idea of membership in a nation, yet under the averments, we think it can not be said that plaintiff is, in any true sense, a member of the nation of Japan. Though ineligible to citizenship until recently, she was and is a permanent resident, owning untainted American property. Her position, we believe, is not within the conception of citizenship of a foreign nation which Congress had in mind in defining a national.

We conclude that the judgment should be reversed and the cause remanded with directions to vacate the order dismissing the complaint and permit the suit to proceed.

Plaintiff insists that in case of reversal this court should enter judgment in favor of plaintiff. To do so would be beyond the limitations of our legitimate functions, for defendant has a right to controvert the averments of the complaint and to have a trial upon the merits. We decide merely that plaintiff has stated a good cause of action and that no act of Congress has taken it away.

The judgment is reversed and remanded with directions as aforesaid.

Josephberg, et al. v. Markham

152 F. 2d 644

Circuit Court of Appeals
Second Circuit

Dec. 10, 1945

Before SWAN, CHASE, and CLARK, Circuit Judges.
CHASE, Circuit Judge.

The appellants, a committee of one Alfred Cerutti, an incompetent, seek to recover property of the incompetent committed to their care which had been vested by the Alien

Property Custodian under order of August 3, 1943.[1] Cerutti was born in Italy, and came to this country in 1913, becoming a naturalized citizen in 1926. At least as early as 1931, he was afflicted with a mental disease known as paranoid schizophrenia and was treated by a New York neurologist during 1929 and 1930. In January of 1931, upon the advice of this doctor that the change would probably be beneficial, Cerutti returned to Italy where he has ever since lived with relatives or at the Villa Turro Sanitarium near Milan as an occasional patient. In 1937, Cerutti inherited a substantial amount of cash and securities in New York. Relatives in Italy instituted "interdiction" proceedings; and in April of that year Cerutti was adjudged an incompetent by the Italian court and a temporary administrator and guardian was appointed. In February of the same year, similar proceedings had been instituted by appellants in the Supreme Court of New York; and a trial by a jury resulted in an adjudication of incompetency. The Italian guardian appeared and sought appointment as ancillary committee of Cerutti's New York property; but, adopting the report of an official referee, the court found Cerutti domiciled and resident, within the meaning of the New York statute, in New York, and by final decree of March, 1939, appointed the appellants as a resident committee of his property. After the vesting order became effective, the appellants duly filed with the defendant a notice of claim for the return of the property but made no application therefor to the President and then brought this suit to recover the property under §9(a) of the Trading with the Enemy Act, supra. The District Court dismissed the complaint on the merits.

Determination on this appeal, both as to the propriety of the seizure and of the standing of the plaintiffs to sue under

[1] The Custodian purported to act under the powers given the President by §§3(a) and 5(b) of the Trading with the Enemy Act of October 6, 1917, as amended by §§301 and 302 of Title III of the First War Powers Act of 1941. 40 Stat. 412, 415, 50 U. S. C. A. App. §§3(a) and 5(b), as amended, 55 Stat. 839, 50 U. S. C. A. App. §§3(a) and 5(b), 617. These powers were transferred to the Custodian and his office created by Executive Order No. 9095 of March 11, 1942, 50 U. S. C. A. Appendix, §6 note, 7 Fed. Reg. 1971, Tit. 3 C. F. R. Chap. II, Cum. Supp. p. 1121.

§9(a) of the Act, depends upon whether Cerutti is an "enemy" or a "national of a designated enemy country."[2] Under the definitions as set out, this turns on whether Cerutti was a "resident" of Italy at the time of the vesting.

Appellants first contend that we are foreclosed by the finding in the commitment proceedings of the New York Supreme Court from again investigating the residence of Cerutti. But commitment proceedings are in rem to determine status. See Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 632, 15 Am. St. Rep. 386. And as such they bind non-parties only as to the status found. See Restate-

[2] Section 2 of the Act provides: "The word 'enemy', as used herein, shall be deemed to mean, * * * — (a) Any individual * * * of any nationality, resident within the territory * * * of any nation with which the United States is at war * * *."

After Germany had practically overrun Europe, Congress amended §5(b) of the Act by Joint Resolution of May 7, 1940, 54 Stat. 179, Section 2 of which provided: "Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed."

Executive Order No. 8389, Section 11B: "The term 'national' of Norway or Denmark shall include any person who has been or whom there is reasonable cause to believe has been domiciled in or a subject, citizen or resident of Norway or Denmark * * * and all persons acting or purporting to act directly or indirectly for the benefit or on behalf of the foregoing." Tit. 3 C. F. R. Chap. II, Cum. Supp. p. 645, at 646, April 10, 1940.

This was amended by Executive Order No. 8785, Section 5, 12 U. S. C. A. §95a note: "D. The term 'foreign country' shall include, but not by way of limitation, (i) The State and the government thereof on the effective date of this Order as well as any political subdivision, agency, or instrumentality thereof or any territory, dependency, colony, protectorate, mandate, dominion, possession or place subject to the jurisdiction thereof, * * *. E. The term 'national' shall include, (i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order, * * *." Id. p. 948, June 14, 1941.

After the United States entered the war, Congress passed the amendatory act of 1941 (supra note 1), section 302 of which provided that all prior "acts, actions, regulations, rules, orders, and proclamations" were "approved, ratified, and confirmed."

And the final attempt at definition is found in Executive Order No. 9193, 50 U. S. C. A. Appendix, §6 note, section 2(f) of which authorizes the Custodian to vest property of "a designated enemy country or national thereof", and section 10(a) of which provides: "The term 'designated enemy country' shall mean any foreign country against which the United States has declared the existence of a state of war * * * and any other country with which the United States is at war in the future. The term 'national' shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, * * *." C. F. R. loc. cit. p. 1174, July 6, 1942.

We are cited to several discussions of Congress, none of which help in the present problem. See S. Rep. 113, 65th Cong., 1st Sess. p. 2; 55 Cong. Rec. 4922.

ment, Judgments (1942), §74(1), and comment a. The decree is "not conclusive [upon non-parties] as to a fact upon which the judgment is based * * *." Id. at §74(2), and comment c.

In argument we are presented with contrary definitions of the word "resident."[3] The appellants argue first that it means domicile, and alternatively, that if it doesn't, it means some conception of legal residence as opposed to actual residence or happenstance physical presence in an enemy country. They then point to many facts to show that Cerutti remained "resident" in the United States: being mentally incompetent, he was never capable of forming the requisite intent to change his domicile or legal residence; that he was in Italy only for the specific purpose of his health;[4] that his remaining in Italy after declaration of war was involuntary.[5]

The appellee to the contrary contends that "resident", as used in the presently pertinent statute, is to be taken to refer to physical presence alone; and further points out that in any event Cerutti, while in this country, had always intended to return to Italy; that when he went there he stayed with relatives; that he was only occasionally, and then voluntarily, an inmate of Villa Turro; that when he was, he was a "free incompetent"; that he tried to purchase a new villa in Italy; that he paid taxes, contributed to local charities, was a sympathizer with the Fascist regime, and voted in the general election of 1934 after having previously ascertained that he was properly enrolled as an Italian citizen and subject.[6] The district judge found that Cerutti

[3] As shown supra note 2, both grounds of the Custodian's action turn on this definition, characterization in §2 of the Act as an "enemy" being defined as "resident within", and "national" of §5(b) as "resident of". The difference on phrasing does not seem so great as to require separate consideration or different results.

[4] Compare §406(c) of the Nationality Code, 54 Stat. 1170, 8 U. S. C. A. §806(c), which provides an exception to the expatriation rule when residence abroad is for purposes of health.

[5] This seems inconsistent with the argument based on his mental incapacity to decide where to live.

[6] It appears from the evidence that not having notified the Italian authorities of his naturalization in the United States, he remained on the rolls.

had become an "actual resident" of Italy and entered judgment for the defendant. This appeal followed.

In determining whether Cerutti falls within the provisions of the statute authorizing the seizure of the property of a citizen of the United States, his physical presence, or to use the phrase of the trial court his "actual residence" there at the time the vesting order took effect, is not decisive. Stadtmuller v. Miller, 2 Cir., 11 F. 2d 732, 45 A. L. R. 895; Vowinckel v. First Federal Trust Co., 9 Cir., 10 F. 2d 19; Miller v. Sinjen, 8 Cir., 289 F. 388. Cerutti's property in New York was in no way threatened with subjection to enemy uses by reason of his presence in Italy. He had no control over it himself since it was being administered by a committee appointed by the New York court; and, consequently, Italy could exercise no control over it through the control of him. Furthermore, the New York court would not have permitted its use for the benefit of an enemy. See Petition of Bernheimer, 3 Cir., 130 F. 2d 396. Such use could also have been prevented by a freezing order issued by the Treasury. See Executive Orders Nos. 8389 and 8785, supra.

The property being in cash and securities its confiscation was not required, as, for instance, is the case of assets consisting of, or controlling, manufacturing facilities usable to secure production of materials to aid this government in the prosecution of the war; and, as a means for the purchase of such materials, it was comparatively negligible.

The purpose of confiscation under the Trading with the Enemy Act is either to lessen the ability of the enemy government to make war upon the United States by depriving it of the means so to do which would otherwise be within its reach or to enhance the ability of this country to prosecute the war. Prize Cases, 2 Black 635, 17 L. Ed. 459; Hanger v. Abbott, 6 Wall. 532, 18 L. Ed. 939; Miller v. United States, 11 Wall. 268, 20 L. Ed. 135, 155; United States v. Chemical Foundation, Inc., 272 U. S. 1, 9-11, 47 S. Ct. 1, 71 L. Ed. 131. To prevent advantage to an enemy by trading with a citizen

residing in the enemy's country the property of the citizen may be seized and confiscated. The Venus, 8 Cranch. 253, 3 L. Ed. 553; Miller v. United States, supra; Kahn v. Garvan, D. C. S. D. N. Y., 263 F. 909. Residence by a citizen in the enemy's country for the purpose of trade stamps the property of the citizen with an enemy character sufficient to support the seizure and confiscation of his property. The Frances, 8 Cranch. 363, 3 L. Ed. 590. "* * * any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation." Miller v. United States, supra, 11 Wall. 268, at pages 305, 306, 20 L. Ed. 135. The powers given the Custodian are phrased broadly so as to make for flexibility of administration enabling effectuation of the purposes of the Act.

When this significance is, as it should be, given to term "resident" in the Trading with the Enemy Act as amended by the First War Powers Act of 1941 and in the Executive Orders promulgated thereunder, it does not include a citizen in Cerutti's situation. He went to Italy on a temporary visit to attempt to regain his lost mental health. He remained there for that purpose until the war broke out and after that was unable to return. No presumption arose under 8 U. S. C. A. §804 from his continuous stay in Italy for three years that his citizenship acquired by naturalization had been lost since, by §806(a) of Title 8 U. S. C. A., §804 thereof is made inapplicable to a person residing abroad on account of ill health.

Although one with his mental incapacity may not have lived abroad involuntarily, by the same token it is impossible to say that he has voluntarily remained there except in the status he had when he went there for a temporary visit. We think "resident" in the statute and orders imports something more than mere physical presence in a designated enemy country. It would be inconceivable, for instance, that Congress intended to provide for the confiscation of the property of a member of the American armed

forces who was captured and held as a prisoner of war within a designated enemy country. Yet in the sense that he was physically present in the enemy country he would be a resident thereof. No such absurd construction of the term is, of course, admissible. Nor does such an extreme case need to be used for illustration. Cerutti's case is a fair example.

His physical presence in Italy at the time his property was seized was a condition not attributable as a matter of law to his volition; his property could not be used to aid the enemy; he was not engaged in trade with the enemy and he could engage in no commercial activities of any kind whatever. He was an American citizen whose presence in Italy for reasons beyond his control did not subject his property to any control or use by an enemy government and so did not make him a "resident" of Italy within the meaning of the statute and executive orders under which his property in this country was seized. Stadtmuller v. Miller, supra; Vowinckel v. First Federal Trust Co., supra; Miller v. Sinjen, supra. Consequently he was neither an "enemy" nor "a foreign national" nor "a national of a designated enemy country."

Though a vesting order may not necessarily be condemnation nor confiscation, it does, when it lawfully becomes effective, prevent any suit for the recovery of the property except in accordance with the provisions of §9(a) of the Trading with the Enemy Act, Draeger Shipping Co., Inc., v. Crowley, D. C. S. D. N. Y., 49 F. Supp. 215, and leaves the ultimate disposition of property subject to action by Congress.

We are bound to construe the term "resident" in so far as reasonably possible in a way to avoid either invalidating the statute and orders on constitutional grounds or raising a serious doubt as to their constitutionality. Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 307, 44 S. Ct. 336, 68 L. Ed. 696, 32 A. L. R. 786; Ex parte Mitsuye Endo, 323 U. S. 283, 299, 65 S. Ct. 208; United States v.

Shreveport Grain & El. Co., 287 U. S. 77, 82, 53 S. Ct. 42, 77 L. Ed. 175. If the term "resident" is held to include a United States citizen in the situation of Cerutti and the statute and orders are construed to provide for the seizure and withholding of his property in this country, held here as it is, the failure to provide any remedy for its return or for just compensation to the owner for its seizure, other than what §9(a) affords, would create such a doubt. Becker Co. v. Cummings, 296 U. S. 74, 79, 56 S. Ct. 15, 80 L. Ed. 54.

Judgment reversed and cause remanded with directions to enter judgment for the plaintiffs.

CLARK, Circuit Judge, dissents with memo.

CLARK, Circuit Judge (dissenting).

Conceding the validity of the abstract legal principles stated in the opinion, I nevertheless think that the District Court's finding of Cerutti's "actual" residence in Italy was not "clearly erroneous" and justified the defendant's judgment, which it arrived at after a most carefully reasoned opinion. Indeed, I cannot avoid the feeling that the present result seems rather absurd as a practical matter. For it views as still a resident of New York for war-defense purposes a man who returned to his old homeland (lately an enemy country) a decade and a half ago, of his own volition and by himself, and stayed there, trying to purchase a villa, paying taxes, contributing to local charities, being "a sympathizer with the Fascist regime", voting there "in the general election of 1934 after having previously ascertained that he was properly enrolled as an Italian citizen and subject", and being "only occasionally, and then voluntarily", an inmate of a sanitarium. Not until six years after his return was he adjudged an incompetent, and then only as to his property. This holding opens distinct possibilities as to means of retaining not merely American citizenship, but American residence for many years after actual residence in a country now our enemy. For example, consider a person caught abroad by the depression without means

to return; does he not come within the ruling? I do not think this case is like that of "transients", such as prisoners of war or other quite temporary visitors. Stadtmuller v. Miller, 2 Cir., 11 F. 2d 732, 45 A. L. R. 895.

The result here appears to flow from two premises, neither of which should be accepted in my judgment. The first is the effectiveness of the adjudication of incompetency (not of commitment) in the New York courts. Had this adjudication not existed, I doubt if Cerutti's Italian actual residence would have been questioned. But as properly pointed out, this adjudication is not legally binding. It should not be made so practically, having in mind the obvious different setting and purpose of the state proceeding. The second is that under the circumstances Cerutti's New York property could not be subjected to enemy uses or enhance the ability of this country to prosecute the war. Passing the point that we cannot know this by any direct evidence of record, I think the whole purpose of the legislation may be frustrated if courts attempt to decide the validity of seizure upon the equities of individual cases. If we are unwilling to declare the invalidity of this war statute as a whole, we are not at liberty to set it aside in particular cases. This is a stern measure, so much so that probably Congress, as before, will be induced to take action for a return in part, if not in whole, of the seized property. But we should not try to anticipate such general legislation by special action in particular instances. I would affirm.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 292

EMMA ECKER,

Petitioner,

vs.

ATLANTIC REFINING COMPANY AND UNITED STATES OF AMERICA AND HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN,

Respondents.

BRIEF FOR RESPONDENT ATLANTIC REFINING COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (W. Calvin Chesnut, District Judge) is reported at *Ecker v. Atlantic Refining Company, et al.*, 125 F. Supp. 605. The opinion of the United States Court of Appeals for the Fourth Circuit (Armistead M. Dobie, Circuit Judge) is reported at *Ecker v. Atlantic Refining Company, et al.*, 222 F. (2d) 618.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1955. The petition for a writ of certiorari was filed on August 4, 1955. The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether real estate owned by naturalized U. S. citizens, living in Austria and found by the Alien Property Custodian to be enemy nationals, could be vested and sold by the Custodian under the Trading with the Enemy Act, 50 U.S.C. App. Sec. 1 et seq.

2. Whether, if Ecker was not an enemy within the Act, the remedy provided by the Act afforded her due process.

3. Whether the Alien Property Custodian could convey a good title to the purchaser, The Atlantic Refining Company.

STATEMENT

The Trial Court stated the gist of the suit as follows (R. 205):[1]

> The second amended complaint is in two counts, the first of which in substance asserts that the seizure and sale of the property was not legally sufficient to transfer title and ownership to the defendant, and the second count charges in effect that the Atlantic Refining Company as purchaser of the property was cognizant of the alleged defects in the power of seizure and sale and in bad faith connived with the Alien Property Custodian in the seizure and sale. The relief sought by the complaint is (1) a declaratory decree that the title to the property still remains in the plaintiff and (2) that the Atlantic Refining Company be re-

[1] R. refers to Appellant's Appendix printed for the Court of Appeals and filed herein.

quired to pay to the plaintiff what she alleges to be the fair value of the property over and above the net proceeds of the sale made by the Alien Property Custodian which have heretofore been received by her from the Alien Property Custodian.

Judge Chesnut's findings upon the principal and controlling facts with regard to the title to the property follow (R. 206-209). Petitioner does not contend that these are not supported by substantial evidence.

1. The plaintiff, Emma Ecker, was born in Austria in 1869 and while living there married Leopold Ecker who was born there in 1876. After their marriage they came to the United States in 1909 and were naturalized in 1921. The next year, 1922, they returned to Austria and bought a residence property in a suburb of Vienna and also nearby a 22-acre vineyard. Between 1922 and 1929 they made some temporary visits to the United States but over the period of seven years they lived for five and one-half years in Vienna. Emma Ecker never returned to the United States until 1951, shortly before this suit was filed. Her husband, Leopold Ecker, did make a few very temporary visits to the United States, the last one being in 1932. Thereafter he and his wife continued to live in their residence property near Vienna until his death in 1948. Leopold Ecker kept a shoe maker's shop in Towson, Maryland, prior to 1921. In 1914 he and his wife purchased the lot in Towson which is the subject matter of the controversy in this case. Before returning to Austria on his visit here in 1932 he made a ten year lease of this property to the St. Paul Realty Corporation, which lease was later assigned, with the consent of the lessor, to the Atlantic Refining Company. The Eckers gave a power of attorney to Frederick F. Schneider, who for many years before and after was the German Consul in Baltimore. Some time before the first lease expired Schneider, as attorney for the Eckers, negotiated with the Atlantic Refining Company regarding a new lease but the correspondence with Ecker upon the subject was inter-

rupted by the outbreak of war in December 1941, and Schneider shortly thereafter and under date of February 21, 1942, executed a new lease as attorney in fact to the Atlantic Refining Company. The new lease extended for a period of ten years with an option to renew for an additional five years. It also contained a provision that the lessee should have right of "first refusal" of any sale price offered to Ecker by anyone. Schneider as attorney collected the rental income less necessary expenses and forwarded the proceeds from time to time to Ecker, receiving for his services a commission of 5% of the rentals collected. After the outbreak of war with Germany and Japan in December 1941 the Treasury Department notified the Atlantic Refining Company that the income from this property was "blocked". The Treasury Department had issued a license authorizing the new lease.

2. The Alien Property Custodian, upon learning of the ownership of the Towson property by the Eckers and having investigated their status under the Trading with the Enemy Act, seized the property as belonging to enemy nationals (within the definition of the Act) by a vesting order dated September 10, 1943, No. 2178 (Stipulation Ex. No. 5). This vesting order recited that the Eckers were "residents of Germany and nationals of a designated enemy country (Germany)," and that said property is "owned or controlled by nationals of a designated enemy country (Germany)" and also that the national interests of the United States require that such persons be treated as nationals of the aforesaid enemy country (Germany) and that the vesting was "subject to recorded liens, encumbrances and other rights of record held by or for persons who are not nationals of designated enemy countries to be held, used, administered, liquidated or otherwise dealt with in the interest of and for the benefit of the United States."

3. In due course of administration the Alien Property Custodian determined to offer the property for sale at public auction and on May 24, 1944 the Safe

Deposit & Trust Company of Baltimore was asked by the Custodian to act as his representative in conducting the sale. On June 12, 13, 14, 16 and 23 the property was advertised in local papers. The advertisement stated that it was to be sold subject to a mortgage of $2,203 and that under the lease on the property "the lessee had the right of first refusal of any offer to the owners for the property." The highest bidder at that time was a Mr. George Kent, a restaurant proprietor in Towson who, however, refused to complete the sale on the ground that he could not secure an insured title policy on the property. After diligent efforts on the part of the Alien Property Custodian to have the purchaser complete the sale, it was finally cancelled by the Custodian on February 21, 1945. Thereafter the Custodian having first obtained a real estate appraisal of the property from Pierre C. Dugan & Nephew, well known realtors in Baltimore City, at $22,000, decided to accept the offer of the Atlantic Refining Company at that figure. The written acceptance by the custodian was dated June 14, 1946 pursuant to the written memorandum of approval by the then Alien Property Custodian dated June 10, 1946 and further ratified and approved by formal written order for private sale dated July 11, 1946. Pursuant thereto the Alien Property Custodian executed a deed for the property to the Atlantic Refining Company upon receipt of the purchase price.

4. On July 29, 1948 Kenneth C. Proctor, of counsel for the plaintiff, filed a claim with the Alien Property Custodian as a result of which the net proceeds of the sale to the Atlantic Refining Company were subsequently paid to the plaintiff, the last payment having been made March 20, 1951. This payment was made by the Alien Property Custodian under the authority of section 32 of the Act which authorized the Alien Property Custodian in his discretion to pay the proceeds of any sales of property theretofore made by him to American nationals even though their property had been theretofore seized and sold by the Alien Property Cus-

todian as enemy nationals. This section of the Act was passed by Congress March 8, 1946 and subsequently amended from time to time, including 1952. The State Department determined in 1949 that the Eckers had not lost their American citizenship.

Extracts from the Stipulation of Facts offered by the parties follow (R. 36-37):

> (13) In 1934 the Eckers were informed by the American Consul in Vienna, Austria, that they were presumed to have lost their citizenship because of their continuous residence in Austria, the country of their births, for a period of more than two years. Thereafter, until August 1940, neither Leopold Ecker nor Emma Ecker applied to the American Consulate in Vienna for passports to enable them to travel to the United States.
>
> (14) In March 1938, Leopold Ecker became a member of the National Socialist Public Welfare Association, also known as the "N. S. Volkswohlfahrt", an organization within the Nazi party.
>
> (15) On September 12, 1939, Leopold Ecker applied for German citizenship. * * *
>
> (16) In or about 1939, Emma Ecker became a member of the National Socialist Women's League, also known as the "N. S. Frauenschaft", the women's auxiliary of the Nazi party.

The evidence upon the state of health of the Eckers is conflicting and contradictory. On August 5, 1940 they wrote Mr. Schneider in response to one of his letters (Government's Appendix p. 32), and closed with "How are you and your family. I hope all are healthy as we are too" (Government's Appendix p. 36). Again, on December 15, 1940 they wrote to him, "How are you and your family? I hope that every one is in good health and I suppose you are very busy as usual. We are also healthy except for minor ailments which are often found with older people" (R. 157). Judge

Chesnut observed (R. 213) that the "contention that they were only prevented by ill health and difficulties of travel during the war did not seem convincing to me when the evidence is considered as a whole".

The Trial Court concluded:

1. That the Eckers were residents of Austria and therefore enemy nationals within the meaning of the Trading with the Enemy Act and the Executive Orders authorized thereunder (R. 212).

2. That there was no bad faith on the part of Atlantic Refining Company (R. 215, 221), Schneider (R. 217) or the Alien Property Custodian (R. 219).

3. That "the plaintiff's property was duly seized and vested by the Custodian and thereafter duly sold to the Atlantic Refining Company as a result of which a good title was transferred to and vested in the defendant, and that the sufficiency of this title cannot be further litigated in this suit against the purchaser" (R. 214-5).

The Court of Appeals in affirming the Trial Court said (222 F. (2d) 620):

> The case and the apposite issues therein were thoroughly discussed in the elaborate opinion filed by Judge Chesnut in the District Court. Since we concur in that opinion, we deem it necessary to add little to that opinion. We, accordingly, content ourselves with a few brief comments on what appear to be the principle issues involved in this appeal.
>
> We think Judge Chesnut was clearly correct in holding that the Eckers were "enemies" as that term is used in the Trading with the Enemy Act (50 U.S.C.A. App. Secs. 1-40).

* * * * * *

We find no merit in plaintiff's attack on the constitutionality of the Trading with the Enemy Act.

* * * * * *

We find, as did the District Judge, that there was no reasonable basis for plaintiff's contention that Atlantic fraudulently conspired with Schneider, or possibly some person connected with the Custodian, to deprive the plaintiff of valuable property rights to her damage.

ARGUMENT

General Considerations

The judgment of the District Court, affirmed by the Court of Appeals, is correct and is not in conflict with any other decision so as to warrant further review of the case by this Court. It was the position of the respondents in both of the lower courts that the seizure and sale under the vesting order was valid even if it should subsequently appear that the Eckers had a non-enemy status (See Government Brief in Court of Appeals, pp. 15-23); (Atlantic Refining Co. Brief, pp. 12-16). It is no longer necessary to stand upon that point, though it is amply supported by the authorities, because both lower courts have found as a fact that the Eckers were enemies within the definition of the Trading with the Enemy Act. Petitioner does not claim that this finding is unsupported by the evidence. Instead she ignores the conclusions of the two lower courts and assigns to herself a non-enemy status (see Petition p. 10, "If we are right that the Act's remedy is constitutionally insufficient where non-enemy property has been seized and sold, it follows inevitably that the owner must be permitted to void the sale"; also at p. 11, "Therefore, this case squarely presents the important unanswered question whether the Government may summarily seize property of a non-enemy, and, thereafter, without any judicial condemnation, sell it, conveying good title, although the price is inadequate, and the

owner is given no remedy beyond the inadequate proceeds of sale."). Her statement that the "price is inadequate" is in direct conflict with the finding of the Trial Court (R. 217-218, "I find from the great weight of the evidence that the sum of $22,000 was a fair and reasonable price for this property when it was sold in June, 1946. The evidence as to this seems to be quite convincing.").

This Court is further misinformed by Petitioner's statement (Petition, p. 13): "Without any investigation, * * * the Custodian seized their real estate solely because Atlantic informed the Custodian that it had failed in attempts to purchase the land from the Eckers, and would appreciate the Custodian's seizing the property in order to sell to Atlantic." There is no evidence, of course, to show that the Custodian seized the property for the reason assigned, but there is evidence (Vesting Order No. 2178, R. 103-105) to demonstrate that Petitioner's statement that the seizure was made "without any investigation" is erroneous. The Trial Court found (R. 207) that "The Alien Property Custodian, upon learning of the ownership of the Towson property by the Eckers and having investigated their status under the Trading with the Enemy Act, seized the property as belonging to enemy nationals * * *." Again, Petitioner asks this Court "to determine whether the Custodian can give good title where the property was wrongfully seized" (Petition, p. 9). There is no justification for such a characterization of the seizure, particularly after the following colloquy between Judge Chesnut and counsel for Petitioner (Brief of Atlantic Refining Co. in Court of Appeals, p. 13):

> (The Court) * * * Now the Government had power to seize the property.
>
> (Mr. Murnaghan) Yes, sir.
>
> (The Court) If you dispute that, I want to know on what grounds you dispute it.

(Mr. Murnaghan) No, sir, I agree the Government had the right to seize the property, Your Honor.

(The Court) Now, that is one thing out of the way.

The effect of these inaccurate statements is to ask this Court to rule upon moot or academic issues which are not part of this case. Petitioner's second question presented to this Court, for instance (Petition, p. 2), assumes that we are dealing with a non-enemy whose property was sold at an inadequate price. As has been said, both lower courts found the Eckers to be enemies and the sales price to be fair and reasonable.

Petitioner has alluded (Petition, pp. 5, 14) to certain "official reports" of the Custodian to the President which are said to deal with real estate vested from Austrian nationals. These documents, with which this respondent and its counsel are unfamiliar, were neither offered in evidence, nor are they otherwise a part of the record. Whatever their contents, they have no relevance to the issues here.

Petitioner's attack upon the Custodian's power to direct a private sale under the circumstances of this case is without merit. The President's power to delegate his authority is not limited to section 12 of the Act, but must be considered under the broader provisions of section 5(b). The applicable statutory provisions and Executive Orders are found in the Government Brief in the Court of Appeals, pp. 23-25, and in the Opinion of the Trial Court at R. 209-211. Judge Chesnut said in this connection (R. 209):

> The powers of the Alien Property Custodian under the Trading with the Enemy Act have so frequently been the subject of judicial consideration that practically all aspects of the matter have been heretofore determined by the courts. I have no doubt that the Alien Property Custodian did have full power and authority to seize and sell this property at private sale after the public sale had failed.

There is no Conflict between Circuits

Petitioner gives as her first reason for granting the writ that the decision of the court below is in conflict with *Nagano v. McGrath,* 187 F. (2d) 759 (C. A., 7th) (affirmed by equally divided court, 342 U. S. 916) and *Josephberg v. Markham,* 152 F. (2d) 644 (C. A., 2nd). The conflict, she says, arises "on the issue of what constitutes residence that determines enemy status" (Petition, p. 7).

The conflict, according to Supreme Court Rule 19(b) should be "on the same matter". It would be difficult to find three cases, arising under a common statute, having less factual similarity. The ultimate question in each is the same however — did the principal have an enemy status within the Trading with the Enemy Act? In *Josephberg* a naturalized U. S. citizen who went to his native Italy on a temporary visit to attempt to regain his lost mental health was found by the 2nd Circuit to have a non-enemy status. In *Nagano* a Japanese woman, permanently residing in Chicago with her husband (according to the averments of the complaint) took her infant daughters to Japan on a temporary visit for the purpose of educating them and procuring husbands for them according to native custom. Caught there by the war, and later permitted to return to the United States "as a returning resident" by an order of the Immigration and Naturalization Service of the Department of Justice, the 7th Circuit found, on motion to dismiss, that she was not "resident within" Japan.

In *Ecker* the principals begin with the purchase of a residence and vineyard in their native Austria, the cessation of all ties with the United States except as a source of income from rented business property, and then a long uninterrupted residence there during which they joined the Nazi party organizations, and Mr. Ecker voluntarily applied

for German citizenship. The wide distinction between these cases is obvious, and the question of enemy status depends upon the peculiar facts of each. If there is substantial evidence to support the findings of enemy status by two lower courts (and Petitioner makes no claim to the contrary), how can it be said that a judgment based upon that ultimate fact is in conflict with other courts deciding similar questions upon different sets of facts?

This Court decided *Guessefeldt v. McGrath*, 342 U. S. 308, on the same day that it affirmed *Nagano* by a divided court. In that case the question was whether the prohibition of section 39 of the Trading with the Enemy Act against restoring vested property to a national of Germany applied to a German citizen who might otherwise prosecute a suit under section 9(a) for return of his property as a non-enemy. The averments of the complaint showed that Guessefeldt, a German citizen residing continuously in Hawaii for forty-two years, took his family to Germany in 1938 for a vacation where he was involuntarily detained by the war. The lower court found that he was "not an enemy" for the purposes of section 9(a), but was precluded from recovering by virtue of section 39. This Court reversed, holding that section 39 is "properly construed as applying only to those German and Japanese nationals otherwise ineligible to bring suit under section 9(a)."

In the course of its opinion this Court said (342 U. S. 312):

> To hold that "resident within" enemy territory implies something more than mere physical presence and something less than domicile is consistent with the emanations of Congressional purpose manifested in the entire Act, and the relevant extrinsic light, including the decisions of lower courts on this issue, which we note without specifically approving any of them.

While this may have been the first time that this Court expressed itself upon the precise meaning of "residence", its observation is only confirmatory of the ordinary definition of the term. In any event nothing that was said was inconsistent with *Nagano,* which, as has been said, was affirmed, though by a divided court, on the same day. Petitioner doesn't say how *Josephberg* applied a different principle, but even if there was an error by the 2nd Circuit in that case, it would provide no reason for a review of the instant case. The Trial Court here had the benefit of this Court's opinion and followed it in applying the facts; indeed, there is no claim by the Petitioner to the contrary.

On Petitioner's Other Reasons for Granting the Writ

a) Petitioner's second reason (Petition p. 9) proceeds on the erroneous premise, as has already been said, that the property was that of a non-enemy and was wrongfully seized. However, if Ecker were not an enemy, she still has no cause of action because her remedy under section 9(a) is constitutionally adequate, as this Court has repeatedly held. *Central Trust Co. v. Garvan,* 254 U. S. 554; *Stoehr v. Wallace,* 255 U. S. 239; *Commercial Trust Co. v. Miller,* 262 U. S. 51; *Becker v. Cummings,* 296 U. S. 74; *Clark v. Uebersee Finanz-Korp.,* 332 U. S. 480. Further, if she were an enemy then there is no prohibition against the seizure and confiscation of her property. *Miller v. United States,* 11 Wall. 268, 304-305; *United States v. Chemical Foundation,* 272 U. S. 1, 11; *Cummings v. Deutsche Bank,* 300 U. S. 115, 120; *Silesian-American Corporation v. Clark,* 332 U. S. 469, 475.

b) Petitioner questions the Custodian's power of sale. Section 5(b) gives the President the power to sell vested property and to delegate that power. Such power was ex-

pressly delegated to the Custodian by Executive Order No. 9095, March 11, 1942, 7 Fed. Reg. 1971 as amended by Executive Order No. 9193, July 6, 1942, 7 Fed. Reg. 5205, (see also 50 USCA, App. p. 43 et seq. for the Executive Orders), and included the power to make a private sale upon a proper finding (see Section 12), which was present here.

The suggestion that some one other than the Custodian should pass upon the question of private sales has no warrant in law. The President charged the Custodian with that duty under a valid exercise of power.

Since the Custodian has title and is authorized by the Act to sell, he transfers a good title to the purchaser.

> It would be futile to contend that the act did not vest in the Alien Property Custodian power to convey an absolute title to seized property. Of necessity a transferee of the Custodian would take such property free from any claim or lien thereon in favor of the former enemy owners. The Custodian had an absolute title to give.
>
> *Munich Reinsurance Co. v. First Reinsurance Co.*, 300 Fed. 345, 349 (Conn.), affirmed 6 F. (2d) 742 (C.A. 2), appeal dismissed, 273 U. S. 666).

c) Petitioner alleges certain irregularities, one of which — seizure without any investigation — has already been shown to be a misstatement. The Trial Court's findings with respect to Schneider's freedom from any improper actions (as well as the Custodian's) have already been given. Schneider, who had handled the property for the Eckers for many years, was appointed by the Custodian to continue to collect the rent and account for the same, for which he was paid 5% or $6.25 per month. He had nothing to do with the management or sale of the vested property. It is perfectly clear that he took no steps on behalf of the Eckers

because he believed that there was no defense to the seizure (R. 160-1).

She says that the Kent bid of $35,000 at the abortive public sale "approximated the then value of the property". There is no evidence to that effect and the finding of the Court was otherwise. There were two qualified appraisals, — the first on November 1, 1943 by W. C. Pinkard & Co. of $15,000 (Government Brief, p. 29), and the one, already alluded to, by Dugan on March 21, 1946 in the sum of $22,000 (of which $2,000 represented the value of the buildings which were the property of Atlantic) (Government Brief, p. 29). Kent admitted on the stand (R. 45) that he had not seen the lease and knew nothing about its terms (such as Atlantic's long tenancy, its right of "first refusal" and the lessor's responsibility for taxes). He did not know that his bid was about twice that of the second highest offer. His advisor (LeBrun) testified that income on real estate should be capitalized at 10% to give a fair return (Atlantic Brief, p. 16). The net income on the property was about $1400 per annum. The Trial Court concluded (R. 218) that "the whole evidence of value in the case satisfies me that Kent's bid was not a well considered one and did not in any true sense reflect the then value of the property."

d) Petitioner's final point about the delayed reply to her lawyer's inquiry is explained by the Custodian's representative, Winston (R. 149-150) — "we had some hundreds of thousands of letters * * * we were swamped."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 26, 1955

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 292

EMMA ECKER, PETITIONER

v.

ATLANTIC REFINING COMPANY, AND UNITED STATES OF AMERICA AND HERBERT BROWNELL, JR., ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS THE UNITED STATES AND HERBERT BROWNELL, JR., IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 125 F. Supp. 605 (R. 205–224). The opinion of the Court of Appeals is reported at 222 F. 2d 618.

JURISDICTION

The judgment of the Court of Appeals was entered May 14, 1955. The petition for certiorari was filed August 4, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner, a citizen of the United States and a native of Austria, who returned to that country in 1922 and lived there continuously from 1929 until 1951, was in 1943 a person "resident within" Austria and therefore an "enemy" for purposes of the Trading with the Enemy Act.

2. Whether, when the Alien Property Custodian has vested under the Trading with the Enemy Act property of a person he has determined to be a national of a designated enemy country and no suit for its return has been brought under Section 9 (a) of that Act, he may sell the property and convey a good title thereto.

3. Whether, in the circumstances of this case, petitioner, who has received the full net proceeds ($20,378) from the Custodian's sale, has been improperly deprived of her property.

STATUTE INVOLVED

The pertinent portions of Sections 2, 5 (b), 7 (c), 9 (a) and 12 of the Trading with the Enemy Act, 40 Stat. 411, as amended, 40 Stat. 460, 40 Stat. 1020, 42 Stat. 1511, and 55 Stat. 839, 50 U. S. C. App. 2, 5 (b), 7 (c), 9 (a) and 12, are set forth in the Appendix, *infra*, pp. 17–23.

Petitioner also seeks to invoke the due process and just compensation clauses of the Fifth Amendment.

STATEMENT

The petitioner, Emma Ecker, sued Atlantic Refining Company ("Atlantic") under the Federal Declaratory Judgment Act, 28 U. S. C. 2201, for a declaration that, despite the vesting of real estate in Towson, Maryland, and a sale of it to Atlantic by the Alien Property Custodian, she still owns it (R. 1–18). The United States and the Attorney General were permitted to intervene under Rule 24, Federal Rules of Civil Procedure, and 28 U. S. C. 2403, when in her second amended complaint the petitioner challenged the constitutionality of the Trading with the Enemy Act (R. 21–32).

The Statement in the petition (Pet. 3–7) practically ignores the findings of the District Court. The facts as found by that court and the evidence on which they were made may be summarized as follows:

Petitioner and her deceased husband, Leopold Ecker, emigrated to this country from their native Austria in 1909 (R. 35, 206). In December 1921, through the naturalization of Leopold, they became citizens of the United States (R. 35, 206). Three months later they returned to Austria (R. 142), and in August 1922, purchased a house and vineyard near Vienna (R. 36, 206). After returning to Austria, Leopold made five visits to the United States between 1922 and 1929, and petitioner accompanied him on two of those visits,

but during that seven year period they lived for five and a half years in Austria (R. 142–143, 206). Petitioner lived at the Austrian property they had purchased from 1929 continuously until her return to the United States in 1951 (R. 36, 143, 206). Her husband lived there continuously from June 1932 until his death in August 1948 (R. 36, 206).

There was no evidence of anything resembling an attempt to return to the United States from 1932 until October 1940, when Leopold applied for an American passport (R. 36, 155, 156). He was informed that he could get a passport only if he proved that he and his wife would return to the United States for permanent residence (R. 156). At that time he wrote Schneider, who was managing the real estate in Towson, Maryland, for the Eckers, that he had not gone to the consulate because of a "two weeks" illness, because a crossing would be "dangerous", and because a "trip around this time of the year is very hard for older people", although they were "healthy except for minor ailments which are often found with older people" (R. 157).

When the Eckers returned to Austria in 1922 Leopold was 46 years old and his wife, the petitioner, was 53. Until 1937 or 1938 both were in good health, according to the depositions of the Austrian witnesses (R. 51–94). About 1938 Leopold had a stroke which paralyzed him for a short period with the result that he could not

walk. Thereafter he improved and became able to walk with some difficulty. Shortly before his death in 1948 he had several more strokes, and he was not able to walk (R. 52, 58, 63, 68, 73, 79, 83, 90). During 1937 or 1938 the petitioner developed a gall bladder trouble which required an operation. She also had swelling and pains in her legs, probably caused by varicose veins, and had difficulty in walking. At no time for any appreciable period was she bedridden or completely unable to walk (R. 53, 58, 63, 68, 73, 79, 84, 91).

In Leopold's 1940 application for an American passport he attributed his failure to return to this country prior to that time to his wife's poor health (R. 155). However, when petitioner applied for registration as an American citizen in Austria in 1949, the reason she gave for their failure to return was her husband's poor health (2R. 7).[1]

In 1938 and 1939 both husband and wife joined Nazi organizations, and on September 12, 1939, he applied for German citizenship (R. 36–37).

The Eckers had acquired title to the real estate in question in 1914 and in 1932 executed, by their attorney, Schneider, a lease to the St. Paul Realty Company. The lease was assigned to the Atlantic Refining Company in 1933. (R. 35.) In 1941, the Eckers offered to sell their property to Atlan-

[1] References designated "2R" are to Volume II of the record as filed in this Court.

tic for $28,000, and through Schneider, rejected Atlantic's offer of $25,000 in early 1942 (R. 37). In 1942, pursuant to a Treasury license under Executive Order No. 8389, as amended, Schneider again leased the property to Atlantic for ten years with a provision that the lessee should have a right of "first refusal" at any sale price offered to the Eckers by anyone. (R. 38, 206–207.)

The Alien Property Custodian vested the property in 1943 (R. 207) and engaged Schneider to collect rents, ascertain taxes, and so on, for a compensation of 5 percent of the rent, $75 a year (R. 38).

On November 1, 1943, an independent appraiser valued the property at $15,000 (2R. 3). In 1944 Atlantic offered to buy the property for $13,500, subject to a mortgage of $2,303.70 (R. 39). The Custodian rejected the offer and ordered the property advertised for public sale, subject to the mortgage and to the lessee's right of first refusal (R. 39, 208). At the public sale a Mr. Kent was the high bidder; his bid was $32,797, subject to the mortgage. The next highest bid was $17,000. In February, 1945, Kent refused to take title to the property and the Custodian elected to retain his deposit of $1,650 as liquidated damages. (R. 6, 40, 208.)

About April, 1945, Atlantic began to negotiate again with the Custodian's office for the purchase of the property. The Custodian again had an

independent appraisal; this time the appraisers put the "fair value of the property" at $22,000 (R. 208; 2R. 3). On June 6, 1946, Atlantic made an offer of $22,000 to the Custodian, and after making a finding that the private sale was in the public interest the Custodian conveyed the property for that price by a quitclaim deed to Atlantic on July 26, 1946 (R. 41).

The Custodian's office did not consult Schneider at any time with respect to the negotiations for the sale, and he was not paid any commission on the sale (R. 41–42; 2 R. 4).

In 1948 petitioner filed with the Office of Alien Property a notice of claim under Section 32 of the Trading with the Enemy Act. In 1950 and 1951 the Office of Alien Property, exercising the discretionary power granted by this section, returned to petitioner the net proceeds of the sale, totaling $20,378.78. (R. 42–43, 208–209.)

The District Court found that the Eckers were residents of Austria and nationals of an enemy country at the time of the vesting in 1943, and that their status with respect to Austria was "very close indeed to domicile" (R. 211–212). With respect to their claimed desire to return to the United States, the court stated (R. 213):

> My impression from the evidence as a whole is that the Eckers never really intended to return to the United States and the fact that Mrs. Ecker did finally return

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> three years after the death of her husband and only shortly before this suit was filed has little weight on the matter of their status as residents and enemy nationals during the recent war. The contention that they were only prevented by ill health and difficulties of travel during the war did not seem convincing to me when the evidence is considered as a whole.

In connection with the status of the Eckers, the court further found that Ecker never did submit the proof of intent to return to the United States for permanent residence which he was asked for when he applied for a passport in 1940 (R. 216).

As to the sale by the Custodian to Atlantic the court found that there was no evidence of improper action or motivation or favoritism, and that the Custodian's office was actuated by ordinary business judgment; that the parties acted in good faith and the sale was an "arm's length" transaction (R. 215–221). It found that on the great weight of the evidence $22,000 was a fair and reasonable price for the property in 1946 and that Kent's bid in 1944 of $35,000, including the mortgage, was not well considered (R. 217–218).

The court held that the provisions of Section 7 (c) of the Trading with the Enemy Act precluded a suit by the former owner against the purchaser of the property and made a suit under Section 9 (a) the exclusive judicial remedy

(R. 211–212). Accordingly, it entered judgment dismissing the complaint (R. 225). The Court of Appeals affirmed, holding that the Eckers were "enemies" within the meaning of the Act as "residents" of Austria, that the Act is constitutional, and that the sale of the real estate was proper and in good faith (2R. 16–19).

ARGUMENT

1. Contrary to petitioner's contention (Pet. 7–9), there is no unresolved conflict among the circuits on the issue of what constitutes residence within the meaning of Section 2 (a) of the Trading with the Enemy Act (App., *infra,* p. 17). In claiming the existence of a conflict between the decision below and the decisions in *Kaku Nagano* v. *McGrath,* 187 F. 2d 759 (C. A. 7), affirmed by an equally divided Court, 342 U. S. 916, and in *Josephberg* v. *Markham,* 152 F. 2d 644 (C. A. 2), petitioner does not correctly assess the effect of this Court's decision in *Guessefeldt* v. *McGrath,* 342 U. S. 308, which was decided after these two Court of Appeals decisions.

In *Guessefeldt* this Court stated, 342 U. S. at 312, that "resident within" implies "something more than mere physical presence and something less than domicile". This holding decided the very point as to which petitioner claims a conflict; in so far as *Nagano* or *Josephberg* may have equated "resident within" with "permanent resi-

dence" or domicile, they must be regarded as overruled.

The decision below is thus in full accord with this Court's holding in *Guessefeldt*. In attributing to "resident" an element of intention, the court below applied correctly the implications of this Court's discussion in *Guessefeldt* of the Congressional purpose to exclude persons like sojourners and prisoners of war.[2] *Guessefeldt* having laid down the proper standards to be followed in determining this question, the decision below which applies these standards to a particular set of facts does not raise a question appropriate for review.

Furthermore, the two cases are also properly distinguishable on the facts. In *Josephberg*, the decision was placed upon the ground that the property owner as an incompetent did not have the necessary intention to become a voluntary "resident" of Italy. In *Nagano*, a family residence was continuously maintained in the United States, in which the property owner's husband actually lived throughout the entire war period.

2. Under Section 7 (c) of the Trading with

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[2] The District Court did not accept petitioner's contention that the Eckers' long residence in Austria was not voluntary, stating (R. 213):

"My impression from the evidence as a whole is that the Eckers never really intended to return to the United States * * *. The contention that they were only prevented by ill health and difficulties of travel during the war did not seem convincing to me when the evidence is considered as a whole."

the Enemy Act (App., *infra*, pp. 20–21), the exclusive remedy of the non-enemy owner of vested property is to recover the net proceeds by a Section 9 (a) (App., *infra*, pp. 21–22) suit against the Custodian in a case where a suit was not filed in time to prevent a sale and the Custodian has sold the property. Premising her argument upon the assumption that the Eckers could not properly be treated as "enemies" under the Trading with the Enemy Act, and that therefore the property was wrongfully vested, petitioner urges that to bar a suit by the former owner against the purchaser raises important questions under the due process and just compensation clauses of the Fifth Amendment.

The constitutionality of the Act and the adequacy of the remedy under Section 9 (a) have long been settled by the decisions of this Court. The restriction of the former owner's remedy to a suit under Section 9 (a) affords due process, for that section gives him an adequate opportunity to recover the property in specie if the vesting was mistaken. *Stoehr* v. *Wallace*, 255 U. S. 239, 246; *Henkels* v. *Sutherland*, 271 U. S. 298, 300. Cf. *Yakus* v. *United States*, 321 U. S. 414, 431–435, 444; *Bowles* v. *Willingham*, 321 U. S. 503, 520; *Wickard* v. *Filburn*, 317 U. S. 111, 129.[3]

[3] On the language of Section 2 of the Act and under the decisions, no distinction is drawn between aliens and American citizens "resident within" enemy territory. *Salvoni* v.

The implication of the decisions of this Court in *Henkels* v. *Sutherland, supra,* and *Becker Co.* v. *Cummings,* 296 U. S. 74, is clear to the effect that the remedy of the recovery of the net proceeds, less only proper deductions, affords due process, particularly where, as specifically found on the facts here (R. 218), the property was sold at a "fair and reasonable price."[4] Furthermore, the Constitution does not require that a plaintiff who has failed to take advantage of an adequate remedy for the recovery of the property itself should be paid just compensation if he delays action until after the property has been sold. *Pflueger* v. *United States,* 121 F. 2d 732 (C. A. D. C.), certiorari denied, 314 U. S. 617; *Duisberg* v. *United States,* 116 C. Cls. 861, 89 F. Supp. 1019, certiorari denied, 340 U. S. 890.

Petitioner's theory would also render administration of the Act impossible. The Act has no provision for a "condemnation" of property as enemy-owned, and if the Custodian may not sell and convey a good title, then as a practical matter

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Pilson, 181 F. 2d 615 (C. A. D. C.), certiorari denied, 339 U. S. 981; *Josephberg* v. *Markham*, 152 F. 2d 644, 648 (C. A. 2); *Kahn* v. *Garvan*, 263 Fed. 909, 915 (S. D. N. Y.). Cf. also *Miller* v. *United States*, 11 Wall. 268, 305–306.

[4] We read these cases and this Court's comment thereon in *Guessefeldt* v. *McGrath*, 342 U. S. 308, 318, to mean that the just compensation clause is to be taken into account by construing the remedial provisions of Section 9 (a) broadly, not to require that a non-enemy plaintiff be given both a due process remedy and just compensation in addition. See *Becker Co.* v. *Cummings*, 296 U. S. 74, 79–80.

he would be unable to sell any property until a Section 9 (a) suit has been brought and decided against the claimant. Accordingly, the decisions of the lower courts have uniformly upheld the provision of the Act restricting the recovery of the former owner to the recovery of the net proceeds from the Custodian and permitting the Custodian to sell when a Section 9 (a) suit has not been brought. See, *Sielcken-Schwarz* v. *American Factors,* 60 F. 2d 43 (C. A. 2), certiorari denied, 287 U. S. 654; *Munich Reinsurance Co.* v. *First Reinsurance Co.,* 300 Fed. 345, 349 (D. Conn.), affirmed, 6 F. 2d 742 (C. A. 2), appeal dismissed, 273 U. S. 666; *Lippman* v. *McGrath,* 94 F. Supp. 1016 (S. D. Ill.); *Miller* v. *Lautenburg,* 239 N. Y. 132, 145 N. E. 907; *American Bosch Magneto Corp.* v. *Robert Bosch Magneto Co.,* 127 Misc. 119, 124, 215 N. Y. Supp. 387, 393, affirmed, 223 App. Div. 759, 227 N. Y. Supp. 765; *Gausebeck* v. *Pallante,* 4 N. J. Super. 118, 66 A. 2d 550.

Petitioner's argument runs so clearly counter to the whole course of thirty years' decisions under the Act that it does not raise a question calling for review by this Court.[8]

[8] Petitioner raises a subsidiary point, that under Section 12 of the Act (App., *infra,* pp. 222–23) a private sale by the Custodian without approval by the President or some other delegate of the President was unauthorized (Pet. 11–12). But by Executive Order No. 90095, March 11, 1942 (7 F. R. 1971), amended by Executive Order No. 9193, July 6, 1942 (7 F. R. 5205), the President delegated to the Custodian the

3. Petitioner's final point is entirely factual and relates to her allegations that there had been "irregularities" and bad faith in the handling of the Eckers' property. The District Court discussed these charges at length (R. 215–224) in its opinion (per Chesnut, J.). Following detailed consideration of the evidence, these charges were found to be wholly unsubstantiated and unwarranted, the court stating:

> I will say at once that as a fact I find no evidence whatever in the case to indicate any improper action or motivation or favoritism of any kind whatever attributable to the government agency, and indeed I rather gathered that the charge against the government was not very seriously pressed in the case on the evidence. There is nothing in the evidence which indicates to me that the Custodian's office in selling this property to the defendant was at any time actuated or motivated by other than ordinary business judgment in the management of the property. Nor do I find any evidence or even any justifiable suspicion that Schneider was acting at any time other than in entire good faith in his relations with the Eckers or the Custodian

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broad power to sell granted by Section 5 (b) of the Act, as amended in 1941, 55 Stat. 839. One purpose of that amendment was to broaden the power to sell and to remove the rigid restrictions in effect during World War I. Senate Report No. 911, 77th Cong., 1st Sess., p. 2; 87 Cong. Rec. 9828, 9861, 9862, 9866. And see, *Markham* v. *Cabell*, 326 U. S. 404, 411–412.

> or the defendant [Atlantic]. * * * [R. 215–216.]
>
> The real heart of the plaintiff's case with respect to injury and for equitable consideration is the contention that the property was sold at private sale for much less than its fair market value at the time. The evidence does not sustain this contention. I find from the great weight of the evidence that the sum of $22,000 was a fair and reasonable price for this property when it was sold in June 1946. The evidence as to this seems to me to be quite convincing. * * * [R. 217–218.]
>
> * * * the plaintiff has not shown fraud, conspiracy or deceit or unfair dealing by the defendant either with Schneider or the office of the Alien Property Custodian. Nor do I find that the plaintiff had not received fair and just compensation for her property as she has received the net proceeds of the purchase price of $22,000, which I find by the weight of the evidence was a fair and reasonable price for the property at the time. That the property may now, six years later, possibly have a somewhat higher value is, of course, quite irrelevant. [R. 224.]

Not only did the trial court explicitly and unequivocally reject petitioner's suggestion of possible irregularities and bad faith, but that court's factual determination was unanimously affirmed on appeal, the Court of Appeals finding

that "there was no reasonable basis" for petitioner's charges. There is thus no occasion for disturbing or according further review to these concurrent fact findings under the familiar two-court rule. *Comstock v. Group of Institutional Investors,* 335 U. S. 211, 214.

CONCLUSION

There is no unresolved conflict of decisions. The constitutionality of the Act and the adequacy of the remedy under Section 9 (a) have long been settled by the decisions of this Court; the decision below accords with these decisions and with the uniform course of the holdings of other courts. On the facts found by the District Court there is no basis for questioning the good faith of the parties or the propriety of the Custodian's action.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1955

APPENDIX

Statute Involved

1. Section 2 of the Trading with the Enemy Act, 40 Stat. 411, 50 U. S. C. App. 2, provides, in pertinent part:

> That the word "enemy", as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—
>
> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory * * *.
>
> * * * * *
>
> (c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy".
>
> * * * * *

2. Section 5 (b) of the Trading with the Enemy Act, 40 Stat. 415, as amended December 18, 1941, 55 Stat. 839, 50 U. S. C. App. 5 (b), provides, in pertinent part:

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or further-

ance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this

subdivision, or any rule, regulation, instruction, or direction issued hereunder.

* * * * *

3. Section 7 (c) of the Trading with the Enemy Act, 40 Stat. 416, as amended, November 4, 1918, 40 Stat. 1020, 50 U. S. C. App. 7 (c), provides, in pertinent part:

> If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.
>
> * * * * *
>
> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced

against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * *

4. Section 9 (a) of the Trading with the Enemy Act, 40 Stat. 419, as amended March 4, 1923, 42 Stat. 1511, 50 U. S. C. App. 9 (a), provides:

> That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other

property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

5. Section 12 of the Trading with the Enemy Act, 40 Stat. 423, as amended March 28, 1918,

40 Stat. 460, 50 U. S. C. App. 12, provides in pertinent part:

* * * * * * *

> The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: *Provided,* That any property sold under this Act except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further,* That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. * * *

* * * * *

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CERTIORARI DENIED